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No. 87-1956

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

1. Appellee suggests (Br. 5-8) that our appeal in No. 87-1956 is moot because our interpretation of the prize list clause of 18 U.S.C. 1302 eliminates any controversy between the government and appellee.[1] Appellee states that it is interested only in publishing lottery prize lists in the form of news stories (or similar commentary) or advertisements. Since, in appellee's view, we have argued that the prize list clause does not apply either to news stories or to advertisements, appellee

[1] Appellee also suggests (Appellee Br. 3) that the case is moot because of the enactment of the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205, and the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988). We showed in our opposition to appellee's earlier motion to dismiss (at 2-4) why that claim is wrong, and this Court denied appellee's motion on January 9, 1989. We rely here on our discussion in our earlier pleading.

submits that the prize list clause will not affect appellee's interests, and this case is now moot. Appellee is wrong for three reasons.

First, appellee has misconstrued our interpretation of Section 1302. We argued in our opening brief that the district court erred in ruling that the prize list clause applies to news stories, editorials, or similar commentary about lotteries. Fed. Br. 15-30. Noting that lists of prizes were often published separately during the period before the Act became law, we argued that Congress adopted a prize list clause in addition to the advertisement clause in order to ensure that the Act would apply to publications that list the prizes offered by a lottery, even if that list was not accompanied by the type of promotional features that would normally be found in an "advertisement." Fed. Br. 23-24 & n.27. Compare *id.* App. 13a (a contemporary advertisement) with *id.* at 14a (a contemporary prize list). We did not contend, however, that the prize list clause does not apply to advertisements that contain prize lists. Advertisements that list lottery prizes, such as the publication reprinted in an appendix to our opening brief, *id.* at 11a-12a, would be covered by both clauses of the Act. In other words, the two clauses in the statute overlap somewhat; they are complementary but not mutually exclusive. Thus, since appellee wishes to carry lottery-related advertising that includes prize lists (Appellee Br. 5-6, 10, 20 n.14), the prize list clause will affect appellee's interests.

Second, the mootness doctrine that appellee invokes bars the courts from exercising jurisdiction over a case in which the plaintiff will neither benefit from a favorable judgment nor suffer from an adverse one.

E.g., DeFunis v. *Odegaard,* 416 U.S. 312 (1974). That is not true here. On the one hand, if the judgment below is affirmed appellee's members can immediately and without restriction use the mails to distribute lottery prize lists that appellee's member newspapers have been paid to publish. On the other hand, if the judgment below is reversed appellee's member newspapers will not be free to use the mails to distribute such prize lists until the exemptions added by the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205, go into effect in 1990. The Court's affirmance or reversal of the judgment below will therefore have a beneficial or burdensome effect on appellee, and that is sufficient to show that the controversy between the parties is still a live one.[2] A case does not become moot simply because the party that prevailed in the court below concedes that the judgment below is wrong, either in whole or in part, and does not seek to defend it. See, *e.g., Ray* v. *United States,* No. 86-281

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[2] Appellee errs in relying (Br. 7-8) on *Deakins* v. *Monaghan,* No. 86-890 (Jan. 12, 1988). In *Deakins,* the plaintiffs brought an action in federal court seeking the return of documents that the plaintiffs claimed had been illegally seized. The lower federal courts rejected the plaintiffs' claim for injunctive relief. By the time the case reached this Court, a state trial court had assumed jurisdiction over the seized materials and had ruled that certain of the documents had been illegally seized; pending before that court were motions seeking the return of the remaining documents. Under those circumstances, affirming or reversing the court of appeals' judgment on the propriety of abstaining from plaintiffs' claim for injunctive relief would not have had any effect on the plaintiffs. The state trial court had already granted their request in part, and the federal district court could not have granted a later request for an injunction, since by then the plaintiffs had been indicted. By contrast, in this case appellee will benefit if the district court's judgment is upheld, since that court entered an injunction against the government. Appellee also will be adversely affected if the judgment below is reversed, since appellee will then be subject to the prize list clause, however it is construed.

(May 18, 1987); *Marks* v. *United States*, 430 U.S. 188, 191-192 n.6 (1977); *Sibron* v. *New York*, 392 U.S. 40, 58-59 (1968); *Young* v. *United States*, 315 U.S. 257, 258-259 (1942). There is no reason to adopt a different rule when the successful party in the court below decides not to challenge affirmatively the position taken by the party that is seeking to have the judgment below overturned.[3]

Third, although appellee has not submitted any argument why the prize list clause should be read to apply to news stories and editorials, appellee nevertheless asks this Court to leave in place that portion of the judgment holding the application of the prize list clause to such expression unconstitutional. See Appellee Br. 21 ("This Court should vacate the decision below *to the extent that* it applies to the mailing of prize lists contained in speech other than news stories and editorials") (emphasis added). Appellee's position on the merits therefore differs from ours. We have argued that the prize list clause does not apply to news stories and editorials; appellee maintains that the prize list clause is unconstitutional as it applies to news stories and

[3] If a case became moot simply because the party that was successful in the lower court agreed that the judgment of that court should be reversed, this Court could not invite an amicus curiae to defend that judgment, as the Court has done on various occasions, *e.g.*, *Bob Jones University* v. *United States*, 456 U.S. 922 (1982), 461 U.S. 574 (1983), since this Court lacks authority to revive a case that has become moot. Also, if the mootness doctrine extended as far as appellee suggests, then the courts would be powerless ever to deny a plaintiff's motion for a voluntary dismissal, and Fed. R. Civ. P. 41(a)(2), which conditions the grant of such motions on leave of the district court, would be meaningless. See also Fed. R. App. P. 42(b) (providing for dismissal by the parties and dismissal by the appellant, but not providing for dismissal by the appellee); Sup. Ct. R. 53.1 and 53.2(a) (same). Cf. *Druid Hills Civic Ass'n* v. *FHA*, 833 F.2d 1545, 1549 (11th Cir. 1987), cert. denied, No. 87-1891 (Oct. 3, 1988).

editorials. Appellee thus asks the Court to render a different judgment than the one we urge.

2. Appellee also suggests (Br. 8-10) that the government's appeal should be dismissed because the record in this case is insufficient for the Court to decide whether the prize list is facially valid. That suggestion lacks merit.

The questions before this Court are legal, not factual. The first involves the meaning of the prize list clause. That is a straightforward question of statutory construction as to which an elaborate factual record is unnecessary. The second concerns the facial validity of the prize list clause, as so construed. An elaborate evidentiary record is unnecessary to resolve that issue, since the issue whether a legislative restriction on commercial speech is lawful does not ordinarily turn on adjudicative facts. The purpose of the Anti-Lottery Act of 1890—to help states that forbid private lotteries to protect the public from their harms—is evident from the legislative and historical background of that law and from *In re Rapier*, 143 U.S. 110 (1892), and *Ex parte Jackson*, 96 U.S. 727 (1877). A factual record is unnecessary to decide whether that purpose is "substantial" under *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), since this Court has repeatedly held that it is. *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 341 (1986).[4]

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[4] See also *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 167-168 (1850); *Boyd* v. *Alabama*, 94 U.S. 645, 650 (1876); *Ex parte Jackson*, *supra*; *In re Rapier*, *supra*; *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1879); *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321, 355-356 (1903); *Otis* v. *Parker*, 187 U.S. 606, 609 (1903); *Ah Sin* v. *Wittman*, 198 U.S. 500, 505-507 (1905); *Lewis* v. *United States*, 348 U.S. 419, 422-423 (1955), overruled on other grounds, *Marchetti* v. *United States*, 390 U.S. 39 (1968).

An elaborate factual record is unnecessary to decide whether the Act directly advances that purpose. That question is generally a matter of legislative judgment, not adjudicative fact, as the Court recognized in *Posadas* and other cases,[5] and this Court implicitly resolved that issue when upholding the Act in *In re Rapier*. Finally, a factual record is unnecessary to decide whether the mailing restrictions in Section 1302 unduly restrict speech. That is a classic question of law, not fact.[6]

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[5] See *Posadas*, 478 U.S. at 340-344 (upholding a restriction on gambling advertising in part since the legislature could reasonably have believed that it was necessary to safeguard the public welfare and would directly advance that interest); *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 508-509 (1981) (plurality opinion) (upholding a restriction on commercial billboard advertising; rejecting the argument that "the record is inadequate to show any connection between billboards and traffic safety" by relying on the "common-sense judgments" of legislators and lower courts that billboards do pose substantial traffic safety hazards); *Central Hudson*, 447 U.S. at 569 ("There is an immediate connection between advertising and demand for [the product]."); *New York State Liquor Auth.* v. *Bellanca*, 452 U.S. 714, 717-718 (1981) (relying on a finding by the state legislature that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior" and that "legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand"). See also *Dunagin* v. *City of Oxford*, 718 F.2d 738, 748-749 n.8 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984) (whether the direct advancement step of *Central Hudson* is met is not a question of fact under Fed. R. Civ. P. 52(a)); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490, 500-501 (10th Cir. 1983) (same), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984). See generally Fed. R. Evid. 201 Advisory Committee Notes on Proposed Rules, 28 U.S.C. at 683-684 (discussing differences between adjudicative and legislative facts).

[6] Appellee's reliance (Br. 9-10) on *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972), is misplaced. There, the district court held unconstitutional every law challenged by the plaintiffs except one, which required a political party to submit a loyalty oath. After both sides filed appeals to this Court, the state legislature revised the election code and rendered

At bottom, appellee has confused the difference between a ruling that a statute is unconstitutional on its face and a ruling that a statute is unconstitutional as applied. Appellee is correct that the record in this case does not contain examples of the types of prize lists appellee's member newspapers would like to print. The record is therefore insufficient to decide whether the prize list clause is invalid as applied to a particular publication. But the district court held the prize list clause facially invalid, and the record is ample to determine whether that ruling is correct.[7] A law may not be held facially invalid under the First Amendment unless its every application creates an impermissible risk of suppression of ideas, or poses a realistic danger that it will significantly compromise recognized First Amendment protections of parties not before the court. *New*

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moot all of the issues decided by the district court except the constitutionality of the loyalty oath requirement. This Court dismissed the plaintiffs' appeal on that claim.

This case involves the opposite situation. The district court held a federal statute unconstitutional at the plaintiff's request, and enjoined the government from enforcing that law and related postal laws against any party. The district court's judgment therefore clearly injures the federal government by preventing a validly enacted federal law from being enforced. Moreover, unlike the plaintiffs in *Socialist Labor Party*, the federal government cannot bring another lawsuit in order to vindicate its interests. And a dismissal of the government's appeal is not a valid option in this case, since that order would leave the district court's judgment intact. The decision in *Socialist Labor Party* is therefore of no assistance to appellee.

[7] The case appellee cites (Br. 9), *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), explains the very difference that appellee obscures. There, the Court held that the record was insufficient to determine whether the Surface Mining Act, 30 U.S.C. 1201 *et seq.*, was unconstitutional as applied to any particular parcel of land. The Court therefore limited its review to the facial constitutionality of the Act. 452 U.S. at 294-297. That is also the appropriate course here.

York State Club Ass'n, Inc. v. *New York,* No. 86-1836 (June 20, 1988), slip op. 8. If the prize list clause can lawfully be applied under some circumstances, and appellee appears to admit that it can (see Appellee Br. 13, referring to *Horner* v. *United States,* 147 U.S. 449 (1893)), then the district court erred in holding that clause facially unconstitutional, because the overbreadth doctrine does not apply to commercial speech. *E.g., Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 496-497 (1982); *Central Hudson,* 447 U.S. at 565 n.8. The proper course in this situation is to reverse the judgment below, not to remand the case for an evidentiary hearing.

3. Amici American Civil Liberties Union and Minnesota Civil Liberties Union maintain (ACLU-MCLU Br. 13-27) that the district court was correct in ruling that the prize list clause applies to news stories. Amici rely on the text of that clause, but they do not discuss its historical background, its purposes, the Court's decision in *Horner* v. *United States, supra,* or any of the other materials we cited in our brief. Those materials show that Congress adopted that law in order to prevent the mails from being used to promote the financial success of a lottery, in particular the Louisiana Lottery, and not to prevent newspapers from sending news stories about lotteries through the mails.[8] Finally,

[8] The other items cited by amici to support their argument are irrelevant. Amici repeatedly, but erroneously, state (ACLU-MCLU Br. 10-11 n.5, 13-14, 18, 19) that the government argued in the district court that the prize list clause should be read to reach prize lists in news stories. In fact, it was the MCLU which took that position in district court; the government took the opposite position. Compare Amicus Minnesota Civil Liberties Union's Memorandum in Support of Plaintiff's Motion for Summary Judgment 7-9 (Aug. 28, 1987) with Defendants' Memorandum of Law in

amici have offered no good reason why the prize list clause should not be construed in a manner that would avoid an unconstitutional interpretation. In a closely analogous context, this Court in *United States* v. *12 200-Ft. Reels of Super 8MM. Film,* 413 U.S. 123, 130 n.7 (1973), said that it would interpret the term "obscene" in a federal statute prohibiting the importation of obscene material in a manner that was consistent with the definition of obscenity adopted in *Miller* v. *California,* 413 U.S. 15 (1973). A similar analysis is appropriate in this case.

4. Appellee (Br. 10-20) and amicus Association of National Advertisers (ANA Br. 27-45) contend that our definition of commercial speech is wrong. Appellee's proposed alternative definition of commercial speech, however, is underinclusive. Appellee would limit the commercial speech doctrine to expression that either proposes a commercial transaction or is an integral part of a commercial transaction. Appellee Br. 12-14. But this would exclude from the scope of commercial speech general promotional or "image advertising"—such as a commercial touting the benefits of a new line of shampoo, or a pamphlet extolling the benefits of a line of sneakers. Such material clearly promotes or advances a commercial transaction, even though it is

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Response to the Memoranda Filed in Support of Plaintiff's Motion for Summary Judgment 5-6 (Sept. 8, 1987). See also Memorandum of Law in Support of Defendants' Motion for Summary Judgment 18-19 (filed Sept. 2, 1987). Amici also rely (ACLU-MCLU Br. 23-24) on regulations adopted by the Postal Service to implement the statute, but those regulations simply mirror the text of the Act. Finally, amici's reliance (ACLU-MCLU Br. 25-27) on the affidavits submitted by appellee is misplaced. The affidavits do not state that we have applied the prize list clause to news stories, and even if they did, that would at most show that individual postal employees misread the prize list clause.

not "directly related to a proposed commercial transaction" (Appellee Br. 12). And this Court has never suggested that promotional advertising of this type is not commercial speech. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

Otherwise, most of appellee's and ANA's criticisms of our definition rest on a misinterpretation of it. In our view, for speech to be commercial it must relate to an ordinary commercial transaction *and* must be made by a person with a direct financial interest in the transaction or in its promotion. For example, a bona fide news story about a bingo game or the merger of two corporations (Appellee Br. 14, 16-17) would not be commercial speech, because the newspaper would not have been paid to write it. And a corporation's criticism of a proposed state income tax (Appellee Br. 15-16, discussing *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765 (1978)), or a physician's objection to socialized medicine (ANA Br. 30) would not be commercial speech because such criticism would not promote an ordinary commercial transaction, even though the speaker might profit, for example, from the defeat of a proposed state income tax or a plan of socialized medicine. Fed. Br. 20-22, 29-30. Of course, in drawing a line between commercial and noncommercial speech, problems will emerge under our proposed definition, as under any other, and the courts should perhaps be willing to give the benefit of the doubt to speech that falls close to the line. But in this particular context, our proposed definition should be relatively easy to apply. A newspaper can easily tell, for example, whether it has been paid to publish a list of the prizes awarded at a lottery drawing. Accordingly, there is no basis to appellee's and ANA's

fears that our proposed definition of commercial speech will deter newspapers from publishing bona fide news stories about lotteries.

In any event, it is not necessary for the Court to agree or disagree with our proposed definition of commercial speech in order for the Court to reverse the judgment below. As we pointed out in our opening brief (at 29 n.32), a list of the prizes to be awarded by a lottery at a future drawing is an implicit proposal to engage in a commercial transaction and therefore falls within "the core notion of commercial speech." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. at 66. See *Central Hudson*, 447 U.S. at 580 (Stevens, J., concurring in the judgment) ("A salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would unquestionably fit within this concept.") (footnote omitted). The statute unquestionably applies to prize lists such as the circular containing a list of prizes awarded in the lottery conducted by the Austrian government at issue in *Horner* v. *United States,* 147 U.S. at 451-453 n.1, 467, and such a prize list would fall within the core notion of commercial speech.[9] Accordingly, this Court's decision in *Horner* provides a sufficient basis for reversing the district court's judgment that the prize list clause is facially unconstitutional, since the *Horner* case shows that the prize list clause can be applied in a constitutional manner. See *New York State Club Ass'n, Inc.* v. *New York*, slip op. 8.

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[9] Even appellee concedes (Appellee Br. 13) that a prize list as the one in *Horner* is at least "arguably" an example of the core notion of commercial speech.

5. Appellee (Br. 20 n.14) and amicus ANA (ANA Br. 27-45) also contend that the mailing restrictions in the prize list clause are invalid under the standard adopted in *Central Hudson*. Appellee, however, makes no argument to support that conclusion. ANA, for its part, overlooks the crucial difference between commercial organizations and commercial speech. See ANA Br. 32. Just as a commercial organization may engage in political expression in order to advance its profitmaking interests, *e.g.*, *First Nat'l Bank* v. *Bellotti*, *supra*, so too a charitable organization may use commercial speech in order to serve its eleemosynary goals. It is the nature of the expression that an organization uses, not the nature of the organization, that determines whether its expression is commercial or political. See *First Nat'l Bank* v. *Bellotti*, *supra*. Otherwise, ANA principally relies (see ANA Br. 27-45) on the arguments that were made in dissent in the *Posadas* case,[10] which we have already addressed in our opening brief.

6. Finally, amicus ANA contends (ANA Br. 13-22) that 18 U.S.C. 1302 cannot constitutionally be applied to forbid the use of the mails to materials that are lawful at either the point of distribution or the point of receipt. ANA's argument blends together the notion that Congress lacks a general police power, the theory that the First Amendment should prohibit all legislative efforts to restrict the commercial promotion of legal activities, and the belief that a restriction on the ability of a majority of states to promote private commercial gaming is inconsistent with principles of federalism.

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[10] Indeed, ANA goes so far as to say that "[i]t is not necessary to consider the correctness of the *Posadas* case since the federal government lacks a national police power." ANA Br. 40 n.8.

None of those theories, or all three considered together, are persuasive.

a. The district court correctly held that it is irrelevant that private lotteries are legal under Minnesota law. J.S. App. 10a. Congress's power under the Postal Clause of Art. I, §8, Cl. 7, "embraces the regulation of the entire postal system," *Ex parte Jackson*, 96 U.S. at 732, and authorizes Congress to close the mails to the intra- or interstate distribution of commercial speech promoting a lottery whether or not it is legal under a particular state's law. *Ex parte Jackson*, *In re Rapier*, and *Posadas* held that the federal and state governments may restrict the commercial promotion of gambling in order to protect the public against the potentially injurious effects that gambling can have on society.[11] Moreover, *In re Rapier* implicitly rejected ANA's contention that Congress cannot exercise its

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[11] We pointed out in our opening brief (at 34) that this Court has recognized that Congress may exclude from the mails "such printed matter or merchandise as may seem objectionable to it upon the ground of public policy." *Public Clearing House* v. *Coyne*, 194 U.S. 497, 507 (1904). ANA suggests (ANA Br. 16) that the *Coyne* decision is no longer good law in light of *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946), but ANA is wrong, for two reasons. First, *Hannegan* involved the scope of the Postmaster General's authority under the Classification Act of 1879, 39 U.S.C. 226 (1940 ed.), to deny second class mailing privileges to a magazine. *Hannegan* held only that the *Postmaster General* lacked inherent authority to exclude material from the mail on public policy grounds. It did not hold that *Congress* lacks the constitutional power under the Postal Clause to bar material from the mails on such grounds. Second, Justice Black's opinion for the Court in *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948), expressly relied on *Coyne* as supporting the constitutionality of what is now 39 U.S.C. 3005 (1982 & Supp. IV 1986), which authorizes the Postmaster General to return mail sent by the perpetrator of a scheme for obtaining money by fraudulent representations. 333 U.S. at 190-191. The decision in *Coyne* therefore is still good law.

postal power in a manner that is inconsistent with state law, because the lottery at issue there, the Louisiana Lottery, was lawful under state law. Those decisions, which ANA barely cites and does not distinguish, directly support the constitutionality of Section 1302.

In dealing with the mailing of lottery-related promotional materials, Congress has followed the same policy that it has endorsed for more than a century regarding the use of the mails to distribute obscene materials. Since the Comstock Act of 1872, ch. 335, §148, 17 Stat. 302, Congress has prohibited the mailing of obscene matter without regard to whether the mailing is inter- or intrastate, or whether the state in which the matter is sent or received itself forbids the distribution of obscene materials. The Court expressly upheld that scheme in *Smith* v. *United States*, 431 U.S. 291 (1977), holding that Congress can make it a federal offense to mail obscene materials into a state that does not itself make the possession of obscene materials a crime. As Justice Blackmun wrote for this Court, "the State's right to abolish all regulation of obscene material does not create a correlative right to force the Federal Government to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material into the permissive State." 431 U.S. at 307. *Smith*, like *In re Rapier*, therefore recognizes that whenever Congress regulates the use of the mails, it is constitutionally irrelevant whether the state where the mail is sent or received also regulates the underlying activity.

Bigelow v. *Virginia*, 421 U.S. 809 (1975), on which ANA heavily relies (ANA Br. 18, 20, 38-39, 43) is inapposite. *Bigelow* involved the constitutionality of

the application of a Virginia law restricting the advertising of abortion services to a newspaper advertisement about the availability of abortions in New York. The advertising restrictions in that case were held invalid, as the Court explained in *Posadas,* 478 U.S. at 345-346, because "the underlying conduct * * * was constitutionally protected and could not have been prohibited by the State." That objection cannot be raised here. ANA relies (ANA Br. 38-39) on a passage in *Bigelow* explaining that Virginia did not have a legitimate interest in restricting the advertising of goods or services that could be legally sold in New York, but that point does not apply to this case. If a state can ban lottery advertising within its borders, and *Posadas* held that a state can,[12] then Congress should be free to assist that state to implement its policy judgment by preventing other states from using the mails to distribute lottery advertising.

b. There is also no merit to ANA's argument that the First Amendment forbids Congress from placing limits on the commercial advertising of an activity that is legal under state law. Aside from the fact that *Posadas* rejected that proposition, ANA's argument is unpersuasive as a matter of policy. Gambling is a recurring problem of an imperfect society, and Congress and the states may prohibit that activity entirely. The experience with Prohibition, however, suggests

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[12] Congress also recently concluded that the states have that authority. As we explained in our opening brief (at 9), Congress postponed until 1990 the effective date of the Charity Games Advertising Clarification Act of 1988 in order to give the states the opportunity to decide, in light of the new amendments tc Section 1302, whether to prohibit lotteries altogether, or to forbid lotteries from advertising.

that a ban on a disfavored activity, such as the consumption of alcohol, can be more harmful than a system allowing that activity to be conducted under strict governmental oversight and control. Governments therefore compromise: They allow some forms of gaming, but limit their operation. A common limitation is to restrict or forbid advertising, since advertising spurs demand.

Section 1302 typifies the compromise adopted by governments on this issue. It represents an intermediate position between imposing a ban on a potentially harmful activity, and permitting the sponsors of that activity freely to enhance consumer demand through advertising. As *Posadas* noted, only "a strange constitutional doctrine" would require government to suffer unlimited promotion of a commercial activity that may be prohibited altogether. 478 U.S. at 346.[13]

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[13] Professor Richard Epstein recently summarized the policy rationale underlying laws such as 18 U.S.C. 1302, as well as the justification for upholding the constitutionality of that policy judgment. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 65-66 (1988) (footnote and emphasis omitted):

> One reason to legalize gambling is simply damage control. It is better that people not gamble, not only for their own personal character, but also for the corrosive effect gambling has on family and business obligations. Nonetheless, it is just too costly to try to control gambling by criminal sanctions. Better therefore to legalize the "disfavored" activity, which can then be taxed to keep participation within reason. Disfavored activities, moreover, need not be treated like all other business activities. Advertisement stimulates business, so it might be proper for a state to decide that, while it should not ban gambling, it should nonetheless moderate its growth by banning advertising. Surely if the issue were the legalization of marijuana and other drugs, a respectable argument could be made to allow their sale, subject to a general tax and to prohibitions or restrictions on advertising, which, because of advertising's public visibility, should be

c. Finally, there is no merit to ANA's suggestion that Section 1302 is unconstitutional because it is inconsistent with the judgment of a majority of the states that some forms of gambling should be permitted. Congress adopted a uniform rule in order to protect the interests of those states that have decided that private lotteries are contrary to public policy. That rule is not irrational simply because those states, which were once in a majority, are now in a minority. ANA cites no decision suggesting that Congress lacks the authority to decide which of two competing policies should be implemented as a matter of federal law, or that, when refereeing a policy dispute among the states, Congress must endorse whatever policy is held by the majority of states. ANA's argument goes to the issue whether it is wise to restrict the distribution of lottery-related materials through the mails, and Congress has recently decided to relax the mailing restrictions somewhat. But that issue is for Congress to resolve, since Congress is in the best position to resolve interstate disputes. Cf. *South Carolina* v. *Baker,* No. 94, Orig. (Apr. 20, 1988),

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reasonably easy to enforce. In effect we have adopted such a strategy with respect to cigarettes, which are sold, heavily taxed, and subject to advertisement restrictions, at least on television and radio. Given the absence of any coherent social attitude toward gambling (or toward drugs, alcohol, tobacco, or prostitution), courts should exercise some deference to state restrictions on such activities, which fall within the traditional "morals" head of the police power as it relates to both property and speech.

That, in a nutshell, is the reason why states restrict the commercial promotion of gambling. The Anti-Lottery Act of 1890 was designed to implement that policy judgment.

slip op. 5-7; *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-554 (1985).[14]

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

WILLIAM C. BRYSON
Acting Solicitor General

MARCH 1989

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[14] There is no merit to ANA's argument (ANA Br. 45-48) that Congress cannot prohibit the use of the mails to promote private lotteries if Congress allows the mails to be used to promote state-run lotteries. The distinction drawn by 18 U.S.C. 1307 between state and private lotteries does not discriminate on the basis of the content of expression or the viewpoint of any speaker; the line it draws is based on the nature of the party responsible for operating a lottery. That distinction is also a rational one. Congress could reasonably believe that a state-run lottery would be less susceptible to infiltration by organized crime than a private lottery. Fed. Br. 36. Moreover, Congress could reasonably decide that federalism principles justified affording the states greater leeway in raising revenues than private parties. Fed. Br. 33 & n.34.

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